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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. [redacted] 17

T. A. MORRISSEY AND JAMES M. O'BRIEN, TRUSTEES OF AN EXPRESS TRUST, KNOWN AS WESTERN AVENUE GOLF CLUB,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

THEODORE B. BENSON,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES
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No. 834

T. A. MORRISSEY AND JAMES M. O'BRIEN, TRUSTEES OF AN EXPRESS TRUST, KNOWN AS WESTERN AVENUE GOLF CLUB,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Petition.

Theodore B. Benson, on behalf of T. A. Morrissey and James M. O'Brien, trustees of an express trust, known as Western Avenue Golf Club, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered January 7, 1935 (R. 67), affirming a memorandum decision of the United States Board of Tax Appeals (R. 30-51), petition for rehearing having been filed February 5, 1935, and denied March 1, 1935 (R. 74).

A.

Summary Statement of the Matter Involved.

The matter involved is the meaning of the word "association" in Section 2 of the Revenue Acts of 1924 and 1926,

43 Stat. 253, 44 Stat. 9, in determining whether the petitioners should be taxed as a corporation under Part II or as a trust under Part I of the Acts.

On October 4, 1921, T. A. Morrissey and James M. O'Brien executed a declaration of trust (Supplemental R. 1-38), to a certain tract of land in the City of Los Angeles consisting of 155 acres, about 42 acres of which were surveyed into lots and sold during 1921 and 1922 through a broker and his salesmen (R. 24). The sales were on the installment basis and collections were made by an agent bank.

On the remainder of the tract the trustees in 1922 constructed a golf club which they operated until January 12, 1924 (R. 26-28).

During the years here in controversy and except for the 12 days in 1924 the only activities of the trust were: (1) Receipt from agent bank of principal and interest collected on installment sales contracts; (2) receipt of credit of interest earned on bank balances; (3) receipt of assignment fees from holders of lot purchase contracts; (4) conveyance of lots to purchasers thereof; (5) receipt of dividends from Western Avenue Golf Club, Inc., upon shares thereof owned by petitioners; (6) distribution of moneys to holders of beneficial interests in the trust by way of dividends and, in some cases, by way of redemption and retirement of beneficial interests (R. 28, 29).

During the years 1924, 1925 and 1926 the outstanding shares ranged from 2,172 to 2,897 and the number held by the two trustees ranged from 451 and a fraction to 632 and a fraction (R. 30). The approximate number of holders of beneficial interest ranged from 275 to 675 (R. 31).

T. A. Morrissey and James M. O'Brien have ever since continued to be and now are the sole trustees (R. 29). The holders of beneficial interest had no voice in the management or administration of the trust, no power to remove

trustees nor to elect their successors nor to control their actions, nor even the right to inspect the books (Supplemental R. 2, 3).

The petitioners filed returns as a trust for each of the years in question (R. 23). The Commissioner of Internal Revenue determined that the trust constitutes an association and assessed a deficiency for each of the years at the rates prescribed for a corporation (R. 13). The Board of Tax Appeals sustained the Commissioner and a petition for review was filed with the Circuit Court of Appeals for the Ninth Circuit and that court affirmed the decision of the Board (R. 67).

B.

Reasons for the Allowance of the Writ.

The Circuit Court of Appeals for the Ninth Circuit has decided an important question, the definition of the word "associations", as to which, as pointed out in *Coleman-Gilbert Associates* v. *Commissioner*, decided February 27, 1935, by the First Circuit, no absolute, conclusive or definite test has been prescribed by this Court, although a statute involving similar provisions was considered by this Court in *Crocker* v. *Malley*, 249 U. S. 223, and the provisions of an excise tax law were considered by this Court in *Hecht* v. *Malley*, 265 U. S. 144.

The question in this case should be passed on by this Court and the court below should be reversed for the following reasons:

"1. The decision of the court below is in direct conflict with the decision of this Court in *Crocker* v. *Malley, supra*, and with the most recent decision on the question that by the United States Circuit Court of Appeals for the First Circuit in *Coleman-Gilbert Associates* v. *Commissioner*, 1935 C. C. H., Volume III, page 9589, in which the Commissioner of Internal Revenue will doubtless apply for a writ of certiorari.

2. The only decision of this Court on the question here involved is that in *Crocker* v. *Malley, supra.* The parties to *Crocker* v. *Malley* were parties to a case that was later before this Court and reported as *Hecht* v. *Malley, supra,* but in the meantime the powers of the trust had been enlarged and it was functioning as an ordinary corporation and, further, the same tax was not involved nor was the same question before the Court. There is no statement in the opinion in the later case that the decision in the former is modified nor in any way departed from.

3. The court below erred in applying as the test to distinguish an association from a pure trust merely the so-called "business test" and gave no consideration to test of function in a corporate manner.

4. In applying as the sole test to distinguish an association from a pure trust, that of doing business, the court below erred in merely following the provisions of the trust and gave no consideration to the activities actually engaged in by the trustees. In this application of the "business test" the decision of the court below is in direct conflict with the decision of the First Circuit in the case of *Coleman-Gilbert Associates* v. *Commissioner, supra,* and the decision gives no consideration to the changed state of facts that was presented to this Court when the *Crocker* case came up a second time in *Hecht* v. *Malley, supra.*

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued to review the judgment of the Circuit Court of Appeals for the Ninth Circuit, and that the judgment of that court be reversed by this Honorable Court.

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Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 834

T. A. MORRISSEY AND JAMES M. O'BRIEN, TRUSTEES OF AN EXPRESS TRUST, KNOWN AS WESTERN AVENUE GOLF CLUB,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion in the Circuit Court of Appeals for the Ninth Circuit was handed down on January 7, 1935, reported in 74 F. (2d) 803, and an order denying petition for rehearing was entered March 1, 1935.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under the Judicial Code, Section 240, as amended by the Act of February

13, 1925, 43 Stat. 938, and Section 1003 (a) of the Revenue Act of 1926, 44 Stat. 110.

The date of the judgment to be reviewed is January 5, 1935. Application for the writ was presented April 1, 1935.

III.

The Facts.

The facts appear in the record (R. 22-31) and in the supplemental transcript of record. A summary statement of the facts is printed in the petition for the writ and to avoid repetition counsel begs leave to refer thereto. The statement in the petition is the shortest and plainest he has been able to make.

IV.

The Statutes Involved.

The provisions of the Revenue Acts of 1924 and 1926 here pertinent are contained in Section 2, in which a corporation is defined to include an association, and in Section 219, in which provision is made for taxing a trust as an individual. Section 2 (a) 2 of each Act reads as follows:

> "The term 'corporation' includes associations, joint stock companies and insurance companies."

Section 219 of the Revenue Act of 1924 and 1926 which relates to trusts provides for the imposition of the individual income tax on either the trustee or the beneficiary.

V.

Specifications of Error.

The United States Circuit Court of Appeals for the Ninth Circuit erred in holding that the trust constitutes an association which should be taxed as a corporation and not a

pure trust which should be taxed at the rates prescribed for individuals.

VI.

THE ARGUMENT.

The Question Is One of Importance.

That the question here involved is one of importance counsel for petitioners feels need not be supported by argument. Counsel for respondent will doubtless concede this but may contend that the question has been put at rest.

The Question Should be Passed On by This Court.

The exact question here involved, the definition of the word "associations" for the purposes of the imposition of the income tax was before this Court in the case of *Crocker* v. *Malley, supra,* and by the application of the test of functioning in a corporate manner this Court held, on a state of facts similar to those involved in the instant case, that the trust should not be taxed as a corporation but as a pure trust. Under a changed state of facts which evidenced that the trust was engaged in doing business in a corporate manner this Court, in *Hecht* v. *Malley, supra,* considered the definition of the word "associations" for the purposes of imposing an excise tax on the privilege of doing business and held that the trust, under the changed state of facts, constituted a corporation and not a pure trust.

Following the decisions in the cases of *Crocker* v. *Malley* and *Hecht* v. *Malley, supra,* the Treasury Department has promulgated various rulings and has changed its position, as pointed out by the court below, which rulings have, however, not been definite nor consistent, as pointed out by the Circuit Court of Appeals for the First Circuit in the case of *Coleman-Gilbert Associates* v. *Commissioner, supra.*

Despite the decision of this Court in *Crocker* v. *Malley, supra,* the question here involved remains one of doubt as discussed below.

Conflict of Decisions.

While the question may have heretofore been before this Court and was decided favorably to the petitioners, the decisions of the lower courts are at this time conflicting and the court below rendered a decision contrary to that of this Court in *Crocker* v. *Malley, supra.*

The court below disregarded entirely the corporate function test and applied what it termed the business test. With reference to this the court stated:

> "As to the contention that 'doing business' is not controlling or relevant, this court in *Twin Bell Oil Syndicate* v. *Helvering,* 70 F. (2d) 402 (C. C. A. 9), after quoting from its opinion in the Trust No. 5833, *Security First National Bank* v. *Welch,* 54 F. (2d) 323 (C. C. A. 9), said at page 407:
>
> 'There is ample additional authority for the proposition that the 'business' test is now paramount.' "

In applying the business test the court based its decision on the business activities authorized by the declaration of trust and did not give consideration to the business activities actually engaged in. In this connection the attention of this Court is invited to the fact that, except for a period of 12 days, the business activities were confined to the collection of outstanding payments on contracts previously entered into for the sale of lots, completing the transfer of title to lands sold and the receipt and distribution of income. These activities are not comparable to doing business as is ordinarily done by a corporation, but were in fact merely steps to the liquidation and termination of the trust. In the respondent's brief in the court below it is

conceded that had the petitioner been a liquidating trust it would not have been taxable as a corporation. The petitioners submit that the trust should be considered as in process of liquidation rather than engaged in the conduct of business as an ordinary corporation.

The court below simply followed its prior decisions and made no attempt to discuss or reconcile the decisions in other circuits, as is very ably done by Judge Wilson of the First Circuit in *Coleman-Gilbert Associates* v. *Commissioner, supra,* in which a trust engaged in more activities than the trust in the instant case was classified as a pure trust and not as an association.

In the case of *Coleman-Gilbert Associates, supra,* the unsettled meaning of the word "associations" is clearly pointed out and the conflicting decisions are cited and the petitioners respectfully submit that the opinion therein clearly indicates that the writ should be granted in this case. The court there reviews the decisions of this Court in the cases of *Crocker* v. *Malley* and *Hecht* v. *Malley, supra,* and with reference to the latter case states (italics supplied:

> "Congress has not undertaken to lay down any tests for determining whether an organization is an association • • •.
>
> It was left for the courts or the Treasury Department by Regulations to determine what organizations are included within the term "associations." *As yet the Supreme Court has not laid down any absolute test.* Two cases only have come before it in which the taxing of trusts as associations was involved: *Crocker et al., Trustees,* v. *Malley,* 249 U. S. 223; *Hecht et al., Trustees,* v. *Malley,* 265 U. S. 144.
>
> This appears to be the last word of the Supreme Court that is helpful in determining what is included in the term "association."
>
> *The Treasury Department has endeavored from time to time to clarify the situation by Regulations* defining

associations and trusts. Under Art. 1504 of Regulation 62, it followed what it understood was the holding of the court in *Crocker* v. *Malley, supra,* and provided that /.

Where trustees hold real estate subject to a lease and collect the rents, doing no business other than distributing the income less taxes and similar expenses to the holders of their receipt certificates, who have no control except the right of filling a vacancy among trustees and of consenting to a modification of the terms of the trust, no association exists. • • • If, however, the *cestuis qui* trust have a voice in the conduct of the business of the trust, whether through the right periodically to elect trustees or otherwise, the trust is an association. • • •

In 1926, following the decision in the *Hecht* v. *Malley* case, by Regulation 69, Arts. 1502 and 1504, and again in 1928, by Regulation 74, Arts. 1312 and 1314, it was provided that, in addition to the above tests in Regulation 62, "if, however, the beneficiaries have positive control over the trust, whether through the right periodically to elect trustees or otherwise, an association exists. • • • Even in the absence of control by the beneficiaries where the trustees are not restricted to the mere collection of funds and their payment to the beneficiaries, but are associated together with similar or greater powers than the directors of a corporation for the purpose of carrying some business enterprise, the trust is an association within the meaning of the statute."

There are numerous decisions of the Board of Tax Appeals and Circuit Courts of Appeals in review, without laying down any definite line of demarkation between an association and a pure trust. In some instances the courts have based their decisions on the rule that where the administrative board has construed an ambiguous or indefinite definition in a statute and no change was made in a later Act of Congress, it is presumed that Congress had adopted the definition

adopted by the administrative board; in other cases the courts have been influenced by other considerations: the limited activities of the trustees, and the purpose of the trust. In any event, the decisions are seemingly in a hopeless state of confusion. Klein's Federal Income Taxation, p. 1139, para. 34:9, and 1933 Suppl., para. 34:9. As the Regulations of the Treasury Department have been modified from time to time, it may well be questioned whether Congress has intentionally adopted every modification of the Regulations when it makes no change in the language of its Acts; or whether it has left it for further construction by the courts, especially if the Regulations have not followed closely the language of the courts. *Tyson et al.* v. *Commissioner*, 68 F. (2d) 584; Trust No. 5833, *Security-First Nat. Bank of Los Angeles* v. *Welch*, 54 F. (2d) 323, 326.

It would serve no useful purpose to attempt to analyze all the cases that have been decided by the Board of Tax Appeals and the Circuit Courts of Appeals involving this question. *The lack of a conclusive test will sufficiently appear in the following cases in which the Board of Tax Appeals has been sustained in holding a trust was an association: Willis et al.* v. *Commissioner*, 58 Fed. (2d) 121; *Smith* v. *Commissioner*, 69 Fed. (2d) 911; *Little Four Oil & Gas Co.* v. *Lewellyn*, 35 Fed. (2d) 149; Trust No. 5833, *Security-First Nat. Bank of Los Angeles* v. *Welch, supra; Sloan et al.* v. *Commissioner*, 63 Fed. (2d) 667; *Investment Trust of Mutual Investment Co., Empire Trust Co., Trustee,* v. *Commissioner*, 71 Fed. (2d) 1009; and in the following cases in which the court has either reversed the Board in holding that the trust was an association, or has approved the Board's finding that the trust was not an association: *Landsdowne Realty Trust* v. *Commissioner*, 50 Fed. (2d) 56; *Lucas, Commissioner,* v. *Extension Oil Co.*, 47 Fed. (2d) 65; *Commissioner* v. *Morris Realty Co. Trust*, 68 Fed. (2d) 648; *Commissioner* v. *Pryor & Lockhart Development Co.*, 70 Fed. (2d)

154, 158; *Commissioner* v. *Kelley* et al., Trustees (decided Dec. 4, 1934 (C. C. A.)).''

In Rewrite Federal Tax Service for 1935, page 1040, paragraph 64, published by Commerce Clearing House, it is stated with reference to the questions here involved:

> ''In spite of much litigation on this question the last word has not yet been spoken as to where the line is to be drawn between a pure trust and an association.''

The conflict here presented is not one arising from different facts, but from the uncertainty as to the tests to be applied.

Conclusion.

In view of the facts that the decision below is in direct conflict with the decision of this Court in *Crocker* v. *Malley, supra,* and with the decision of the Circuit Court of Appeals for the First Circuit in *Coleman-Gilbert Associates* v. *Commissioner, supra,* and that there is confusion as to the definition of the word ''associations'' and as to the tests to be applied to determine when a trust should be taxed as a corporation, the petitioners submit that the writ should be granted and that the holding of the court below that the business test alone is sufficient to cause a trust to be taxed as a corporation, should be reversed.

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